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The Times Are They a-Changin’?: What *Kivalina* Says About the State of Environmental “Political Questions”¹

*Native Village of Kivalina v. ExxonMobil Corp.*²

I. INTRODUCTION

In February 2010, the Washington D.C. area experienced a record-setting series of snowstorms.³ Dubbed the Snowmageddon, the storms shut down the Federal government for almost a week.⁴ For many, the shutdown was symbolic of the frustration the nation experiences with today’s political process in D.C., as many believe Washington is “broken” and nothing meaningful is ever accomplished.⁵ This current sentiment is especially frustrating when interested citizens advocate for certain policies and laws that are considered political in nature and therefore can only be decided by Congress or the Executive Branch.

¹ First released in January 1964, “The Times They Are a-Changin’” by Bob Dylan headlined his third album of the same name. The song would quickly become an anthem for the Civil Rights Movement and gave voice to the emotion within the Movement. *SEE BOB DYLAN, The Times They Are a-Changin’, on THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

² 663 F. Supp. 2d 863 (N.D. Cal. 2009).

³ Just to give a few statistics, Washington D.C. National Airport saw 55.9 inches of snow on the ground and Washington D.C. Dulles Airport experienced 72.8 inches of snow. Jason Samenow, *Amazing mid-Atlantic Snow Statistics*, THE WASHINGTON POST, Feb. 12, 2010, available at

http://voices.washingtonpost.com/capitalweathergang/2010/02/amazing_mid-atlantic_snow_stat.html.

⁴ Snowmageddon emerged out of many candidates as the “official” nickname for the snowstorm when President Obama used the term during a Question and Answer session. ‘*Snowmageddon: Obama names Blizzard*’, THE HUFFINGTON POST, Feb. 2, 2010, http://www.huffingtonpost.com/2010/02/06/snowmageddon-obama-names-n_452204.html.

⁵ To highlight one example of the public’s disapproval, a March 18th Gallup poll (for reference, this was before the healthcare bills were passed) showed that only 16% of the public approved of Congress’s job performance. Jeffrey M. Jones, *Obama’s Approval Rating Lowest Yet, Congress’ Declines*, March 18, 2010, <http://www.gallup.com/poll/126809/Obama-Approval-Rating-Lowest-Yet-Congress-Declines.aspx>.

At times, this gridlock in deciding political issues results in interested citizens becoming plaintiffs seeking to adjudicate their grievances in court. Two such issues that have become adjudicated grievances - who bears the cost of harms resulting from global warming, and its derivative, whether oil companies should be found liable for melting ice caps - have proven to be particularly troublesome for plaintiffs seeking to bring suit against oil companies subsequently responsible for greenhouse gas emissions.⁶ This Note explores how the political question doctrine⁷ affects plaintiffs seeking to bring suit for damages caused by global warming.

The political question doctrine, first articulated by the Supreme Court in the holding and dictum of *Marbury v. Madison*, has prevented questions that are political in nature or exclusively allocated to the Executive or Legislative Branch by the Constitution from being decided in the Judiciary.⁸ By examining the 2009 case *Native Village of Kivalina v. ExxonMobil Corp.* ("*Kivalina*"), this Note shows how the evolution of the political question doctrine has subsequently left global warming plaintiffs with very few avenues for relief.

⁶ Three cases, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005)), *Comer v. Murphy Oil*, 598 F.3d 208 (5th Cir. 2010), and *California v. General Motors*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) have been brought by plaintiffs for global warming harms. All of these cases were dismissed in lower courts due to the plaintiff presenting nonjusticiable political questions. As discussed in Part III D, the cases met different fates upon appeal.

⁷ Professor Barkow comprehensively explains both the political question doctrine and how the parameters of the doctrine were formed in her Columbia Law Review article. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002) ("In *Marbury* [referring to *Marbury v. Madison*, 5 U.S. 137 (1803)], Chief Justice Marshall acknowledged the existence of certain questions that are wholly outside the purview of the courts -- 'questions, in their nature political.' [T]his reference . . . reveals Marshall's fundamental conception of the separation of powers and highlights both the limits of judicial authority and the interpretative role played by the political branches." *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

⁸ See *Marbury*, 5 U.S. at 170. This is not to say that the aspects of those issues, such as whether the questions were decided in a constitutionally consistent manner, are not judicially reviewable. The political question doctrine only attempts to ensure that the judiciary does not create policy or infringe upon the other branch's powers.

Two conclusions are reached through this Note's analysis of the *Kivalina* decision. First, although the political question doctrine is essential to the preservation of our democracy through continued separation of powers within the federal government, the jurisprudence of the political question doctrine, when coupled with the current political climate, leaves environmental advocate litigants with little hope for an adequate remedy to redress their harm. Second, and perhaps more important to the future of global warming suits, this Note analyzes *Kivalina's* holding to provide a judicial framework plaintiffs might use to overcome the political question doctrine and bring suit for global warming claims.

II. FACTS AND HOLDING

The village of Kivalina ("Kivalina" or "the Village") is a self-governing Eskimo tribe located in Alaska along a six-mile long barrier reef approximately 70 miles north of the Arctic Circle.⁹ The coastline of the Village is protected by Arctic sea ice ("the ice") that acts as a shield for Kivalina during coastal storms and their potentially damaging waves.¹⁰ However, as a result of global warming, the sea ice attaches to Kivalina later in the year, breaks up earlier, and is thinner and less extensive.¹¹

Due to the erosion and destruction of the Arctic sea ice protecting the Village, Kivalina brought suit against 24 oil, energy, and utility companies, one of which is ExxonMobil Corporation ("Defendants").¹² In seeking relief under the federal common law claim of nuisance, Kivalina asserted that the Defendants contributed to the emission of greenhouse gases, which caused global warming, which in turn caused the melting of the ice.¹³ Specifically, the Village stated that the buildup of carbon dioxide and methane (conditions that cause global warming) are human made and attributable to increases in the combustion of fossil fuels, fuel

⁹ Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

¹⁰ *Id.* at 869.

¹¹ *Id.*

¹² *Id.* at 868.

¹³ *Id.*

harvesting, coal mining and oil drilling.¹⁴ All of these activities are associated with the Defendants' businesses.

In granting the Defendants' motion to dismiss for lack of jurisdiction, the court held that the Plaintiff's claims were not justiciable under the political question doctrine and the Plaintiff did not have Article III standing to bring the claim.¹⁵ Additionally, the Plaintiff's state law claims were dismissed without prejudice in order to allow the Plaintiff to re-file in state court.¹⁶

III. LEGAL BACKGROUND

A. *Legal Standard for Federal Court's Jurisdiction*

Federal courts are courts of limited jurisdiction that possess only those powers authorized by the Constitution and Congressional statutes.¹⁷ Therefore, in cases before a federal court, the court presumes that it lacks jurisdiction unless the record shows the contrary to be true.¹⁸ Consistent with this premise, federal circuit courts, including the Ninth Circuit, hold that the plaintiff has the burden to prove jurisdiction in order to survive a Federal Rules of Civil Procedure 12(b)(1) motion to dismiss.¹⁹ Additionally, if at any time the court finds that it lacks subject-matter jurisdiction, the court must dismiss the action.²⁰

B. *The Political Question Doctrine*

Some disputes involving political questions lie outside of the Article III requirement that judicial power is only vested in deciding cases

¹⁴ *Id.* at 869.

¹⁵ *Id.* at 883.

¹⁶ *Id.* at 882-83.

¹⁷ *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (Scalia, J., dissenting).

¹⁸ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)).

¹⁹ *Kivalina*, 663 F. Supp. 2d at 870.

²⁰ FED. R. CIV. P. 12(h)(3).

and controversies.²¹ To determine whether the political question at issue is nonjusticiable, a court must determine whether or not the dispute requires the court to “make a policy judgment of a legislature rather than resolving a dispute through legal and factual analysis.”²²

The *Baker* test, as articulated in *Baker v. Carr*, sets forth six independent factors that demonstrate the presence of a nonjusticiable political question.²³ If any of the six factors are found, the dispute is not within the court’s jurisdiction. The factors are as follows:²⁴

1. A textually demonstrable constitutional commitment to another political branch.
2. A lack of judicially discoverable or manageable standards for the court to resolve the issue.
3. The impossibility of deciding the issue without making an initial policy determination that is of nonjudicial discretion.
4. The impossibility of undertaking the issue without expressing a lack of respect to another branch.
5. An unusual need for unquestioning adherence to a prior political decision on the issue.
6. The potential for embarrassment from multiple pronouncements on one question at issue.

The six *Baker* factors are traditionally grouped into three categories.²⁵ Factor 1 is grouped into Category 1 and is characterized as an inquiry into whether the issue is Constitutionally committed by text to another branch.²⁶ Factors 2 and 3 are grouped into Category 2 and are an inquiry into whether the resolution of the question would demand the court to move beyond judicial expertise.²⁷ Finally, Factors 4-6 are grouped into

²¹ *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007); U.S. CONST., art. III § 2, cl. 1.

²² *Kivalina*, 663 F. Supp. 2d at 876 (quoting *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005)).

²³ *Id.* at 871 (citing *Baker*, 369 U.S. 186, 210 (1962)).

²⁴ *Id.* at 871-872 (citing *Baker*, 369 U.S. 186, 210 (1962)).

²⁵ *Id.* at 872 (quoting *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005)).

²⁶ *Id.* (internal citation and quotations omitted).

²⁷ *Id.* at 873 (quoting *Wang*, 416 F.3d at 996).

Category 3 and inquire into whether prudential considerations counsel against judicial intervention.²⁸ Given *Kivalina's* holding, only Categories 1 and 2 will be covered in this Note.

1. Category 1 – Textual Commitment

Under a textual commitment examination, courts look to determine whether the decision at hand has been exclusively committed to either the legislative or the executive branch of the federal government.²⁹ This is determined by looking to whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of the question at issue.³⁰

2. Category 2 – The Scope of Judicial Expertise

a. Judicially Discoverable and Manageable Standards

In determining whether a case is manageable, courts consider whether or not there are legal tools that allow a ruling that is principled, rational, and most importantly reasoned.³¹ If there are no cases that provide guidance to reach a resolution in a reasoned manner, the courts will defer judgment to another branch.³²

b. Initial Policy Determination

In assessing whether a policy judgment of a legislative nature exists, the chief inquiry looks to whether the court removes “an important policy determination from the Legislature.”³³ The crux of this inquiry

²⁸ *Id.* at 872 (quoting *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007)).

²⁹ *Id.* (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358-59 (11th Cir. 2007)).

³⁰ *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 240 (1993)).

³¹ *Id.* at 874 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)).

³² *Id.* (citing *Alperin*, 410 F.3d at 552).

³³ *Id.* at 876 (quoting *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 297 (S.D.N.Y. 2006)).

rests on whether a court subsequently decides an issue based on a determination not through legal and factual analysis but through a decision as to what is the best policy.

C. *The Tort of Public Nuisance*

According to the Restatement (Second) of Torts § 821 (b)(1), a public nuisance is “an unreasonable interference with a right common to the general public.”³⁴ Unreasonableness is determined by weighing the gravity of harm with the utility of conduct.³⁵ This determination is examined through a “reasonable person” standard, meaning whether the interference was reasonable when looking at the situation as a whole, impartially, and objectively.³⁶ Applying these standards, in cases involving energy sources, possible alternatives, and any “alleged” damage that the consumption of those energy sources “caused”, a fact finder must weigh the energy source against its alternatives.³⁷ Specifically, the fact finder must weigh the energy producing alternatives to the energy source in question, their reliability as energy sources, safety considerations, and the impact of those alternatives on both consumers and businesses at every level.³⁸

D. *Recent Political Question and Public Nuisance Court Decisions in the Environmental Law Field*

To date, three other global warming cases were filed against defendants in the car and energy industry that invoked political question analyses.³⁹ These cases, *Connecticut v. American Electric Power Co.*

³⁴ *Id.* at 874 (quoting RESTATEMENT (SECOND) OF TORTS § 821(b)(1) (1979)).

³⁵ *Id.*

³⁶ *People ex. rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (Cal. 1997) (citing RESTATEMENT (SECOND) OF TORTS §§ 826-31).

³⁷ *Kivalina*, 663 F. Supp. 2d at 874-75 (citing *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 at *8 (N.D. Cal., Sept. 17, 2007)).

³⁸ *Id.*

³⁹ *Maria V. Gillen, The Rebirth of the Political Question Doctrine*, 23 NAT. RESOURCES & ENV'T 23, 25 (2008).

("AEP")⁴⁰, *California v. General Motors, Co.* ("GM")⁴¹, and *Comer v. Murphy Oil* ("Comer")⁴² were all dismissed in circuit courts for presenting a nonjusticiable political question and subsequently met different results on appeal.⁴³

First filed in 2004, *AEP*⁴⁴ was the first global warming case dismissed as being a nonjusticiable political question.⁴⁵ The plaintiffs, several political subdivisions and environmental organizations who brought suit against coal burning power companies for the common law tort of public nuisance, timely appealed the decision to the U.S. Court of Appeals for the Second Circuit.⁴⁶ The two-judge panel⁴⁷ proceeded through a 90-page analysis of the issues and focused most of its time on the political question *Baker* factors.⁴⁸ The court found that the first, second, and third *Baker* factors did not apply, as (1) no textual commitment in the Constitution exists to grant the Executive or Legislative branch sole responsibility to resolve conflicts alleging carbon dioxide emissions causing harm and (2 and 3) judicial standards of a public nuisance tort suit exist to obviate the need for initial policy determinations.⁴⁹ Concerning the third through sixth factors, the Court asserted that judicial adjudication would not contradict prior decisions and seriously interfere with governmental interests.⁵⁰ As a result of their analysis, the court held that the district court erred in dismissing the

⁴⁰ 582 F.3d 309 (2d Cir. 2009).

⁴¹ No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

⁴² 585 F.3d 855 (5th Cir. 2009).

⁴³ Gillen, *supra* note 39, at 23.

⁴⁴ 582 F.3d 309 (2d Cir. 2009).

⁴⁵ Gillen, *supra* note 39, at 24. As will be more fully explained in the following paragraphs, each case has a differing final decision. *AEP* was reversed and remanded in the Second Circuit Court of Appeals. A re-hearing in banc was granted in *Comer* (pending case citation: 2010 WL 685796 (S.D. Miss.)) and *General Motors* granted the defendant's motion to dismiss.

⁴⁶ *Connecticut v. Amer. Elec. Power Co.*, 582 F.3d 309, 320 (2d Cir. 2009).

⁴⁷ Of note, Justice Sotomayor was originally the third member of the panel but was subsequently elevated to the U.S. Supreme Court on August 8, 2009. 582 F.3d at 313.

⁴⁸ *See id.* at 321-32.

⁴⁹ *Id.* at 325, 329-31.

⁵⁰ *Id.* at 331-32.

plaintiff's greenhouse gas public nuisance claims as a nonjusticiable political question and remanded the case for further proceedings.⁵¹

Next, in 2006 the State of California brought suit against automakers in *GM* for creating and contributing to global warming.⁵² The plaintiff brought forth both federal and state common law nuisance tort claims, stating that the defendants created and maintained a public nuisance due to the pollution, and subsequent global warming, caused by their products.⁵³ Using the *Baker* analysis to determine whether the plaintiff's claims were nonjusticiable, the court mainly focused on the second and third factors. The court's analysis of the third factor focused on what policy determinations, if any, were necessary in adjudicating a global warming claim.⁵⁴ Drawing from case law⁵⁵, the court determined that the essence of the plaintiff's claims, who bears the cost of global warming due to carbon dioxide emissions from the defendant, was a policy determination that precedent dictated as nonjusticiable.⁵⁶ Building off that determination, the court's analysis of the second factor determined that there was a lack of judicially manageable or discoverable standards to resolve the plaintiff's claim.⁵⁷ Specifically, the court reasoned that the scope of inquiry for the public nuisance tort associated with global warming is well beyond standards found in prior case law and therefore there is no judicial guidepost to aid the court in adjudication.⁵⁸ Given

⁵¹ *Id.* at 392-93. The court also found that the plaintiffs had standing to bring the suit. *Id.*

⁵² *California v. Gen. Motors, Co.*, No. C06-05755 MJJ, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007).

⁵³ *Id.* at *2.

⁵⁴ *Id.* at *6.

⁵⁵ The court primarily used two cases to support its conclusion. First, the court mirrored the language of the lower court decision in *AEP*: "In *AEP*, the court rejected a similar global warming nuisance claim finding that resolution of the issues required "an initial policy determination of a kind clearly for non-judicial discretion." *Id.* at *7 (quoting *AEP*, 406 F. Supp. 2d 272, 274). Second, the court discussed the implications of *Massachusetts v. EPA*'s holding - that authority to make conclusions determining the standards of carbon dioxide emissions lie within the political branches - to show that Supreme Court precedent existed to classify the plaintiff's claim as a policy determination. *Id.* at *12 (citing *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)).

⁵⁶ *Gen. Motors*, 2007 WL 2726871 at *13.

⁵⁷ *Id.* at *16.

⁵⁸ *Id.* at *15.

these determinations, the court dismissed the plaintiff's claims as nonjusticiable.⁵⁹

Finally, *Comer*, a case originally filed in 2005 but decided in the appellate court in 2009, concerned a class action suit filed by property owners along the Mississippi Gulf coast against energy, chemical, and fossil fuel industry corporations operating in the area for, among other legal causes of action, the tort of public nuisance.⁶⁰ The plaintiffs' complaint was that the corporations' activities increased the global water and air temperatures, which in turn increased the ferocity of Hurricane Katrina, which caused the destruction of the plaintiffs' property.⁶¹ Although legal precedent existed in *GM* favorable to the defendants' theory of dismissal, the court stated that these cases were "legally flawed and clearly distinguishable" from *Comer*.⁶² The *Comer* court first found that the *GM* case misread the *Chevron* test and subsequently erred in stating that an impermissible balancing of social and economic interests, akin to the tasks done by a legislative body, must occur.⁶³ The court contended that this serious misinterpretation of law allowed the *GM* Court to erroneously assume that they would have to imitate the functions of the legislative or regulatory bodies.⁶⁴ The *Comer* court stated that this false premise led the *GM* court to conclude that the case before it was a

⁵⁹ *Id.* at *16.

⁶⁰ *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

⁶¹ *Id.* at 859.

⁶² *Id.* at 876. Note that the *Comer* Court also stated that the *AEP* decision was erroneous in logic. *Id.* They are correct, as they are referring to the district court decision that was subsequently overturned by the *AEP* case discussed immediately above. *Id.*; *Connecticut v. Amer. Elec. Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009).

⁶³ *Id.* The *Chevron* test is referring to the *Chevron* deference test found in *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.* 467 U.S. 837 (1984). Gellhorn and Levin's ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL describes the *Chevron* test as two inquiries the court should look into when reviewing an agency's administration of a statute. ERNEST GELHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 81 (Thomson West 2006). The first inquiry is whether "Congress has directly addressed the precise question at issue." *Id.* If this has occurred, the court must give effect to Congressional intent, if it is unambiguous. *Id.* The second inquiry, dealing with situations where the statute is silent or ambiguous to the specific issue, mandates that the court should accept the agency's action if it is a reasonable interpretation. *Id.*

⁶⁴ *Comer*, 585 F.3d at 877.

nonjusticiable political question.⁶⁵ Second, the *Comer* court questioned the *GM* Court's application of the political question doctrine concerning whether or not public nuisance suits were preempted by federal and state regulatory statutes.⁶⁶ The *Comer* court went on to clarify that the federal preemption was inapplicable in this case and there also was not preemption against a state bringing a public nuisance suit.⁶⁷ With this analysis in mind, the *Comer* court held that the plaintiffs did not present a nonjusticiable political question and remanded the case for a re-hearing in banc.⁶⁸

E. Article III Standing

Article III standing is a threshold question concerning whether a party has jurisdiction in a federal court.⁶⁹ The party invoking jurisdiction has the burden of establishing the minimum requirements for standing.⁷⁰ In setting out the Supreme Court's modern test for standing, *Lujan v. Defenders of Wildlife* stated that to establish standing, a petitioner must demonstrate (1) particularized injury occurred, (2) the injury was caused by and is fairly traceable to the act challenged, and (3) that the injury can be redressed by the court.⁷¹ Injury is established when a party demonstrates that it has suffered an injury that affects it in an individual way.⁷² Additionally, an alleged injury must be actual or imminent, not hypothetical, and also can be generalized so long as the injury was concrete.⁷³ Therefore, in environmental injury cases, a plaintiff can have standing if an environmental harm occurred and caused injury to the plaintiff.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.* at 877-78.

⁶⁷ *Id.* at 879.

⁶⁸ *Id.* at 880. During the re-hearing, the 5th Circuit was unable to hold a quorum of judges to hear the case. Due to this, the case has subsequently been dismissed. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2009).

⁶⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

⁷⁰ *Id.* at 560-61.

⁷¹ *Id.*

⁷² *Id.* at 560.

⁷³ *Id.*; *FEC v. Akins*, 524 U.S. 11, 24 (1998).

⁷⁴ *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996).

Turning to the causation requirement, a plaintiff must show that the injury is fairly traceable to the actions of the defendant.⁷⁵ This traceability is shown by demonstrating a causal connection between the injury and the conduct of the defendant, without the presence of a third party or independent action intervening.⁷⁶ Article III requires a substantial likelihood level of proof that the defendant's conduct caused the plaintiff's injury.⁷⁷ Therefore, in situations where procedural standing is in question (a theory that grants standing based on congressionally prescribed standards), the substantial likelihood level of proof is met when the defendant exceeds the congressionally prescribed limit.⁷⁸

Finally, for an injury to be fairly traceable, a distinction must exist between plaintiffs who lie within a zone of discharge of the defendant and those individuals who lie too far from the zone of discharge to be fairly traced to the defendant.⁷⁹ The zone of discharge requirement is, in essence, a test as to whether or not the chain of causation is too attenuated, either in location or time.⁸⁰

F. "*Special Solitude*" under Article III Standing

After the Supreme Court's decision in *Massachusetts v. EPA*, parties and courts have read *Massachusetts's* holding as granting a

⁷⁵ *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009) (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

⁷⁶ *Id.* (quoting *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008)). This standard speaks to the possibilities of a contribution or seed of injury theory for recovery. In essence, the injury must be directly related to the defendant's actions. Therefore, the injury cannot be due to contributions from the defendant's actions or actions caused by a defendant *or* from a multitude of other possible defendants.

⁷⁷ *Id.* at 878 (quoting *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008)).

⁷⁸ *Id.* at 879 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 172-173 (4th Cir. 2000)).

⁷⁹ *Id.* at 881 (quoting *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.* 95 F.3d 358, 361 (5th Cir.1996)).

⁸⁰ *Id.* at 881-82 (citing *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 478 (D.C. Cir 2009)).

“relaxed” standing requirement to sovereigns.⁸¹ This “special solitude” requirement is given to entities when federal procedural rights exist to protect certain rights a state had to surrender upon entering the Union.⁸² The sovereign entity can challenge a federal government entity, in *Massachusetts*’ case the EPA, to determine if the federal government action was arbitrary and capricious.⁸³

IV. INSTANT DECISION

Writing for the court, Judge Sandra Brown granted the Defendants’ motions to dismiss for lack of subject matter jurisdiction and dismissed without prejudice Kivalina’s state claims for re-filing in California state court.⁸⁴ The opinion examined the two theories for dismissal that the Defendants brought forth; dismissal for lack of subject matter jurisdiction and dismissal for lack of standing.

A. Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction – The Political Question Doctrine

The court first assessed whether Kivalina’s claims were outside the Article III jurisdiction of federal courts and therefore nonjusticiable.⁸⁵ Relying on two general analysis tools derived from the six *Baker* factors to determine whether Kivalina’s claims were political questions,⁸⁶ the court determined that Kivalina’s complaints were better suited for the Legislative or Executive Branch.

⁸¹ The *Massachusetts v. EPA* decision was interpreted as a relaxed standard due to the special solitude requirement in *Ctr. for Biological Diversity v. Dept. of Interior*. 563 F.3d 466 (D.C. Cir. 2009). The language for the *Biological Diversity* decision was inspired by the lower court’s dissenting opinion in *Massachusetts v. EPA* and the Supreme Court’s dissent in *Massachusetts v. EPA*. See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2006); *Massachusetts v. EPA*, 549 U.S. 497, 534-60 (2007) (Roberts, C.J.; Scalia, Thomas, and Alito, JJ., dissenting).

⁸² *Massachusetts*, 549 U.S. at 519-20.

⁸³ *Id.* at 520.

⁸⁴ *Kivalina*, 663 F. Supp. 2d at 883.

⁸⁵ *Id.* at 871.

⁸⁶ *Id.* at 872.

In addressing the first inquiry, whether a textual commitment to the issue is present, the court stated that the threshold issue is whether the Constitution allocates final responsibility to one of the political branches.⁸⁷ In denying the Defendants' arguments that Kivalina's claims touched on foreign policy and therefore were nonjusticiable, the court held that the first *Baker* factor was not implicated.⁸⁸ Although the court acknowledged the international nature of Kivalina's claims, and particularly the implication that Kivalina's emission cap argument carries for U.S. foreign policy, the Defendants failed to point to any provision in the Constitution showing the claim's determinations were vested not in the Judicial Branch but with another branch.⁸⁹ Therefore, the court presumed that no limitations existed and the Judicial Branch was able to hear Kivalina's claims.⁹⁰

Turning to the second inquiry, whether a lack of judicially discoverable and manageable standards existed to make an initial policy decision determination unavoidable, the court broke its analysis into two prongs.⁹¹ First, in examining whether judicially discoverable and manageable standards existed, the court held that given the scale of liability Kivalina sought to impose, there were no standards in case law that would aid the court to reach a resolution in a reasoned manner.⁹² In examining the standards necessary to reach a decision, the court noted that a case is manageable if relief can be granted in a reasoned manner rather than allowing a claim to proceed based on a hope for a ruling.⁹³ With this, and a determination that the fact finder would have to weigh energy alternatives and their respective impact, quality, and safety, the court held that a lack of standards existed that would enable the court to resolve Kivalina's nuisance claims in a reasoned manner.⁹⁴ Of note, in reaching

⁸⁷ *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 240 (1993)).

⁸⁸ *Id.* at 873.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 876.

⁹³ *Id.* (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)).

⁹⁴ *Id.* at 873-77. In discussing the alternatives to oil and gas energy sources, the court examined discussions in *California v. General Motors Corp.* See *Gen. Motors*, No. C06-05755 MJJ, 2007 WL 2726871 (Sept. 17, 2007).

the determination that there were a lack of standards for resolving the nuisance claim presented, the court dismissed⁹⁵ *AEP*'s holding and precedent in favor of adjudication because the court found the environmental injuries and factual patterns to be distinguishable.⁹⁶

Next, the court turned to the second prong, whether initial policy determinations would need to be made that would be more appropriate for the political branches.⁹⁷ Here, the court had little trouble in finding that a policy determination would need to be made.⁹⁸ Reasoning that a political question occurs if the court has to make a policy judgment legislative in nature, the court held that because Kivalina's claims required the court to decide who should bear the cost of global warming, Kivalina's claims were nonjusticiable.⁹⁹

B. Defendants' Motion to Dismiss for Lack of Standing

Next, the court turned to the question of whether Kivalina had standing to bring suit against the Defendants, specifically looking to the causation requirement of standing.¹⁰⁰ In breaking the causation requirement into three prongs, (1) Defendants' contribution to the injury, (2) the "Seed" of the injury, and (3) the Zone of Discharge, the court held that Kivalina did not have standing to bring suit. First, in examining whether the Defendant contributed to Kivalina's injury, because Kivalina conceded that it could not trace the alleged injury to the Defendants, Kivalina needed to show that (1) the Defendants contributed to Kivalina's injury and (2) a congressionally prescribed limitation existed in which the

⁹⁵ The court dismissed *AEP*'s holding rather than overruling it because the courts are in different federal circuits. The Northern District of California, where *Kivalina* was decided, is within the Ninth Circuit. *AEP* was decided in the U.S. Court of Appeals for the Second Circuit.

⁹⁶ *Kivalina*, 663 F. Supp. 2d at 875-76.

⁹⁷ *Id.* at 876.

⁹⁸ *Id.* at 877.

⁹⁹ *Id.* at 876-77 (citing *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (stating that a political question "exists when . . . the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.")).

¹⁰⁰ *Id.* at 877 (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

Defendant exceeded causing such injury to occur.¹⁰¹ In finding that Kivalina could not point to any federal standard limiting the discharge of greenhouse gases, the court held Kivalina could not show that the Defendant contributed to Kivalina's injury.¹⁰²

Second, the court stated that even if the contribution theory was met, Kivalina did not allege that the seed of its injury could be traced to any of the Defendants.¹⁰³ The court reasoned that Kivalina did not trace the injury to the Defendants, as a multitude of other potential defendants existed and specific emissions by the Defendants (1) could not be identified and (2) could not be traced to the Defendants.¹⁰⁴ Third, in examining whether the zone of discharge prong was met, the court examined whether Kivalina's injury could be fairly traced to the Defendants.¹⁰⁵ Here, the court held that the injuries could not be fairly traced, as it is impossible to trace the path of greenhouse gas emission and Kivalina's injuries are far removed both in space and time from the Defendants' alleged discharge.¹⁰⁶

V. COMMENT

Two lessons, and corresponding conclusions, can be drawn from an analysis of the *Kivalina* decision. First, the current state of political question jurisprudence (in relation to global warming) and political gridlock in Washington leads one to the conclusion that a plaintiff has a hard road ahead for an adequate remedy. This conclusion is readily seen when the overall malaise of global warming regulation and adjudication is examined. Second, in order to combat the current frustration in the Judicial Branch's treatment of global warming adjudication, creativity in pleading a claim is necessary.¹⁰⁷ Therefore, in order for plaintiffs to

¹⁰¹ *Id.* at 878-80.

¹⁰² *Id.* at 880.

¹⁰³ *Id.* at 880-81.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 881-82.

¹⁰⁷ Sadly (for me), the idea of creativity to combat malaise is not mine nor new. A well-known articulation of how to creatively cure a public policy problem was penned by Professor Philip Harter nearly thirty years ago. See generally **Error! Reference**

succeed in bringing global warming suits, the terms of the complaint need to be framed in a precedent-friendly manner.

A. *Lesson 1 – The Frustrations for Global Warming Plaintiffs*

1. Political Question Frustration

The Supreme Court has found that a political question bars adjudication only twice since the *Baker* decision created the modern political question test.¹⁰⁸ Given this consideration, it seems odd that global warming plaintiffs have faced such resistance at the hands of the political question analysis. The circuit split nature of *AEP*, *GM*, *Comer*, and *Kivalina* have left global warming plaintiffs with a truly uncertain environment to attempt to seek redress. Specifically, a plaintiff must speculate whether (A) a court will accept persuasive language in *AEP* discussing the necessity for courts to view the global warming issue as among those the federal common law allows for adjudication¹⁰⁹ or (B) whether a court will find *Kivalina*'s pronouncement specifically against *AEP*'s decision to apply similar law and fact patterns as conclusive.¹¹⁰ The analysis is additionally frustrated by the fact that the political question doctrine is one of limited application and applied in a case-by-case

source not found., *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

¹⁰⁸ Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine & the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267-68 (2002).

¹⁰⁹ See *Connecticut v. Amer. Elec. Power*, 582 F.3d 309, 330-31 (2d Cir. 2009).

("Similarly, the fact that the Clean Air Act ("CAA") or other air pollution statutes, as they now exist, do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a "comprehensive" global solution to global warming. Rather, Plaintiffs here may seek their remedies under the federal common law. They need not await an "initial policy determination" in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century.")

¹¹⁰ See *Kivalina*, 663 F. Supp. 2d at 875. ("This Court is not so sanguine [in referring to the *AEP* court]. While such principles may provide sufficient guidance in some novel cases, this is not one of them.").

manner,¹¹¹ and the other courts tend to weigh some cases as heavier than others with no mandate to do so.¹¹² Given the numerous inconsistencies among the lower federal courts' decisions, the issue seems prime for the Supreme Court to determine conclusively¹¹³ that global warming costs are political in nature or that they are within the realm of judicial adjudication. However, these avenues might be deadly for the global warming plaintiff's cause.

2. Political Branch Frustration - the Inaction of the Legislative and Executive Branch

Due to the *Massachusetts* holding, the EPA was directed to initiate rulemaking unless it concluded that greenhouse gases did not contribute to climate change or provided an explanation found in the statute that justified the EPA not determining the possibility of greenhouse gases' contribution.¹¹⁴ Subsequently, under the policies set forth in the Obama Administration, the EPA is moving closer to regulating greenhouse gases regardless of a Congressional decision to pass global warming emission standards.¹¹⁵ However, although these policies are now in place, inaction still persists.

A *Washington Post* article on December 8, 2009 detailed an EPA announcement that the agency would initiate rulemaking to reduce

¹¹¹ See James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 933 (2008).

¹¹² This variance is due to the fact that cases decided by different circuit courts of appeal are persuasive but not precedent.

¹¹³ The Supreme Court has taken cases to resolve a circuit split. See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("We granted certiorari to resolve the Circuit split and now reverse."); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) ("We granted certiorari in order to resolve the resulting Circuit Split and now affirm"); *Bank of Am. Nat. Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 443 (1999) ("We granted certiorari to resolve a Circuit Split on the issue.").

¹¹⁴ Gillen, *supra* note 39, at 25.

¹¹⁵ Steven Mufson & David A. Fahrenthold, *EPA is Preparing to Regulate Emissions in Congress's Stead*, THE WASHINGTON POST, Dec. 8, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120701645_pf.html.

emissions of six gases, including carbon dioxide.¹¹⁶ Largely a response to the *Massachusetts* ruling and the Senate's inaction in passing the "cap and trade" legislation, the EPA's decision was met with hostility and anger among the Senators.¹¹⁷ Since this announcement, lawsuits and Congressional posturing have eroded support for the EPA's movement toward emission regulation.¹¹⁸ At the same time, while "cap and trade" legislation passed the House, the legislation was met with opposition in the Senate and eventually died a slow, but inevitable death. On February 27th, 2010, the *Washington Post* reported that Senator Lindsey Graham (R – S.C.) declared the legislation dead.¹¹⁹ A blow to environmental regulation, Senators Graham, John Kerry (D – Mass.) and Joseph Lieberman (I – Conn.) were developing a Senate alternative to the House bill that would be able to get through the chamber while satisfying the House leadership.¹²⁰ As of the time of writing¹²¹, no alternative plan has been announced.

The culmination of pro-environmental regulation frustration occurred on March 29, 2010.¹²² Answering the questions posed by commentators as cap and trade legislation became increasingly likely to fail,¹²³ the EPA's announcement detailed several findings and stated that it

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Bradford Plummer, *Can Lawsuits Stop The EPA's Carbon Rules?*, (Feb. 21, 2010), available at <http://www.tnr.com/print/blog/the-vine/can-lawsuits-stop-the-epas-carbon-rules>.

¹¹⁹ Juliet Eilperin & Steven Mufson, *Senators to Propose Abandoning Cap-and-Trade*, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/02/26/AR2010022606084_pf.html.

¹²⁰ *Id.*

¹²¹ Final draft of this note submitted April 18, 2010.

¹²² Juliet Eilperin, *EPA Affirms Delay in Regulating Power Plant Emissions*, THE WASHINGTON POST, Mar. 29, 2010, available at http://views.washingtonpost.com/climate-change/post-carbon/2010/03/epa_to_issue_johnson_memo.html.

¹²³ Bradford Plumer, *The Substitute*, (Feb. 8, 2010), available at <http://www.tnr.com/print/article/politics/the-substitute> (questioning whether the EPA can handle climate change policies if climate change legislation dies).

would not regulate power plant and vehicle emissions under the Clean Air Act until January 2, 2011.¹²⁴

3. Judicial Frustration – Standing Frustration and the Possibility of Conservative Judicial Activism

In examining the court's standing holding, *Kivalina* suffers from a misinterpretation in the *Massachusetts v. EPA* decision that has subsequently led other decisions astray.¹²⁵ By focusing on the causation requirement, the *Kivalina* opinion seizes on the Plaintiff's claim - that they only need to show the Defendants contributed to the Plaintiff's injuries in order to have standing - to show that the standing test could not be met.¹²⁶ While the court's discussion of the "contribution to the injury" standard is correct, as is their "seed of the injury" discussion, the opinion's reasoning when discussing the "zone of discharge" requirement is flawed on the grounds that it assumes that the link is too weak between the Defendants' actions and the Plaintiff's claim.

In citing *Biological Diversity's* holding, that a casual link between government approval of offshore leases and gas and oil development is too tenuous to demonstrate a climate change standing claim, the court uses precedent that misinterprets *Massachusetts*.¹²⁷ In addition to referencing a

¹²⁴ EPA, RECONSIDERATION OF INTERPRETATION OF REGULATIONS THAT DETERMINE POLLUTANTS COVERED BY CLEAN AIR ACT PERMITTING PROGRAMS, Mar. 29, 2010, available at http://www.epa.gov/nsr/documents/psd_memo_recon_032910.pdf.

¹²⁵ *Massachusetts v. EPA*, 549 U.S. 497 (2007). The *Massachusetts* decision has been misinterpreted in *Comer v. Murphy USA*, 585 F.3d 855 (5th Cir. 2009), and *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466 (D.C. Cir. 2009). For a more thorough analysis of the misinterpretation of the *Massachusetts* decision, see Michael A. Moorefield, Note, *Have the Sons Disobeyed their Fathers? The Massachusetts Standing Analysis after Biological Diversity*, 17 MO. ENVTL. L. & POL'Y REV. 391 (2010). Briefly, the issue with *Biological Diversity*, *Comer*, and now *Kivalina's* interpretation of *Massachusetts* is that subsequent courts almost dismiss the analysis of *Massachusetts* as solely being relevant to sovereign entities and not generally applicable to general standing law principles. Therefore, the *Massachusetts* holding, and its subsequent legal precedent, have been viewed as a "carve out" to a special situation rather than legal precedent for standing analysis. See *id.*

¹²⁶ *Kivalina*, 663 F. Supp. 2d at 881.

¹²⁷ *Id.* at 881-82 (citing *Biological Diversity*, 563 F.3d at 478).

questionable decision, the opinion is relying on a statement that is not directly applicable to the question at hand.¹²⁸ In *Biological Diversity*, the court's holding was focused not on whether the subsequent oil companies were at fault for the global warming consequences of the ice melting, but rather whether the Department of Interior failed to follow several statutory mandated processes in assessing the prospective leases' environmental impact.¹²⁹ Therefore, *Kivalina's* analysis into *Biological Diversity's* relevance is at best secondary support.

More directly to *Kivalina's* fact pattern, the Plaintiff did not help its cause by stating that "the relevant geographical area should be the entire world" when looking to the zone of discharge.¹³⁰ But the holding of *Massachusetts* remains, as the Supreme Court determined that the State had standing and was able to successfully bring suit due to a loss of shoreline when glaciers melted due to an increase in greenhouse gases. An honest analysis of the fact patterns of *Kivalina* and *Massachusetts* should lead a court to the conclusion that due to *Massachusetts*, the Village's theory of causation should survive standing analysis.

Kivalina's interpretation of *Massachusetts* highlights the implications of an issue being discussed in both the media and legal academia throughout the past few years – the possibility of Supreme Court judicial activism.¹³¹ On the final day of the 2006 term, Justice Breyer stated "It's not often in the law that so few have so quickly changed so much."¹³² Justice Breyer was not alone in this sentiment, as many

¹²⁸ *Id.* at 882.

¹²⁹ See *Biological Diversity*, 563 F.3d 466.

¹³⁰ *Kivalina*, 663 F. Supp. 2d at 881.

¹³¹ For example, the New York Times published an Op-Ed entitled *Last Term's Winner at the Supreme Court: Judicial Activism* in 2007 that pointed out the inconsistency between the conservative judicial philosophy of judicial restraint and the Op-Ed author's opinion of what the Roberts Court has actually done. Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, available at <http://www.nytimes.com/2007/07/09/opinion/09mon4.html>. From a legal academia perspective, law schools have held various symposiums to address the issue. See, e.g., Symposium, *Precedent and the Roberts Court, Methodologies for Analyzing Precedent and the Roberts Court*, 86 N.C. L. Rev. 1107 (2008).

¹³² See *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 803 (2007) (Breyer, J., dissenting) (this statement was made in Justice Breyer's oral dissent), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion/.

commentators echoed the Court's perceived active movement to the Right.¹³³ This quotation is most recently exemplified by the outcry over judicial activism in *Citizens United v. Federal Election Commission* from liberal commentators, the dissenting opinion of the decision, and legal scholars who questioned the continued philosophy of an interpretation, and not creation, of law that the Roberts Court claims to follow.¹³⁴ In probably the most famous commentary on the Court's decision, President Obama stated in his first State of the Union Address: "'With all due deference to separation of powers,'... 'last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.'"¹³⁵ What becomes clear is not a specific presence of evidence showing environmental litigation activism, but the general emerging pattern of judicial inconsistency that could be viewed as judicial activism. The Supreme Court's decisions have increasingly been criticized as political in nature and motivated by an agenda. Therefore, given the fact that global warming litigation is trending toward an increased frequency of suit, plaintiffs should be aware not only of the legal precedent but the political opinion of global warming and carbon dioxide emission. This is truly a troubling revelation, as courts could be denying the adjudication of suits based on a political question analysis in one instance, but deciding others based on an agenda in another situation.

¹³³ See Lee Epstein et al., *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299 (2008).

¹³⁴ See 130 S. Ct. 876 (2009). For a brief analysis of the decision and commentary of its impact, see [http://www.scotuswiki.com/index.php?title=Citizens United v. Federal Election Commission](http://www.scotuswiki.com/index.php?title=Citizens+United+v.+Federal+Election+Commission). Probably the most quoted passage from the dissenting opinion concerning the Court's decision came from Justice Stevens, when he stated, "Under the majority's view, I suppose it may be the First Amendment's problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech." *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting).

¹³⁵ President Barack Obama, 2010 State of the Union Address (Jan. 27, 2010), transcript available at <http://www.nytimes.com/2010/01/28/us/politics/28obama.text.html>.

B. Lesson 2 – Creativity in Argument Articulation as a Solution

1. The Way a Legal Argument is Framed Matters

The concept of framing gained the attention of both political parties after the November 2004 presidential election.¹³⁶ Previously, only the Republican Party, under the direction of pollster Frank Luntz, fully understood the importance not of the message itself but how the message was communicated. However, when the Democratic Party's candidate, John Kerry, lost the presidential election, the Party started to assess whether their message was the reason or whether the way they communicated the message was the problem.¹³⁷

Framing is particularly useful when structuring legal arguments with policy undertones. In a *NY Times* article, an attorney discussing *Zellman v. Simmons-Harris*¹³⁸, a 2002 Supreme Court decision, said the following:

One of our strategies was to distill the message, not only for the [C]ourt but in the court of public opinion . . . We wanted to make sure this was seen not as a case about religion but about education. If the [C]ourt perceived it as a religion case, then we would be in serious trouble. If [the Court] saw it as an education case, then we would win.¹³⁹

In short, framing really matters. The way an argument is framed before a court can determine how the issue is adjudicated and if it will even allow for adjudication.

¹³⁶ Matt Bai, *The Framing Wars*, N.Y. TIMES, Jul. 17, 2005, at 1, available at <http://www.nytimes.com/2005/07/17/magazine/17DEMOCRATS.html>.

¹³⁷ *Id.*

¹³⁸ 536 U.S. 639 (2002).

¹³⁹ Linda Greenhouse, *Win the Debate, Not Just the Case*, NY TIMES, July 14, 2002, available at <http://www.nytimes.com/2002/07/14/weekinreview/the-nation-win-the-debate-not-just-the-case.html?scp=1&sq=%22Win%20the%20Debate,%20Not%20Just%20the%20Case%22&st=cse>. The attorney's side did win, in a 5-4 decision.

2. Framing the Legal Argument – What Global Warming Plaintiffs Can Do to Win Political Question Inquiries

Given the political roadblocks that have frustrated the direction of post-*Massachusetts* environmental regulation, it appears that the only viable litigation strategy for global warming plaintiffs currently is the tort based nuisance claims found in *Kivalina*. The second *Baker* factor - that constitutionally discoverable and manageable standards are required to suffice one of six factors in the *Baker* analysis - is prudential in nature.¹⁴⁰ *Baker* Factor Two is, then, essentially a requirement that looks to previous case law, statutory standards, and other available legal resources to evaluate the particular claim in question. If global warming plaintiffs can develop positive case law akin to *Comer* and *AEP*'s argument articulation, *Baker* Factor Two becomes a potent weapon for the global warming plaintiff.

Additionally, opportunities exist in *Kivalina* specifically¹⁴¹ and the *GM* decision generally to frame the decisions as flawed. Consistent with sound political question doctrine principles, the court found that a policy determination existed in determining who should bear the cost of global warming.¹⁴² However, the court went on to state that the allocation of fault and cost of global warming is a matter appropriately left to the Executive and Legislative Branches.¹⁴³ Both prongs of this sentence - that (1) fault and (2) costs should be left to the other branches - are questionable. The first prong is questionable due to the truth of the statement and the second is due to the policy determination that the court, itself, needed to make.

First, the notion that the Judiciary cannot allocate fault for global warming is simply wrong. *Massachusetts* has clearly shown that not only can the Judiciary find fault for harm caused by global warming, they can also do so when this harm was caused by greenhouse gas emissions. Second, although an analysis of the costs of global warming is certainly a political question in nature, courts should consider exploring the particular

¹⁴⁰ May, *supra* note 111, at 940.

¹⁴¹ See *Kivalina*, 663 F. Supp. 2d at 876-77.

¹⁴² *Id.*

¹⁴³ *Id.* at 877.

barriers to the political question of who bears the cost of global warming. While the Judicial Branch is not in the business of rulemaking, it is in the business of protecting an individual's rights if other branches are not, or are failing to do so.

VI. CONCLUSION

Global warming is the biggest policy issue of our time. While groups and individuals can bicker about the best way to address global warming and its effects, no responsible individual can flatly deny advocates all avenues for resolution. Given the political question doctrine's use in preventing pro-plaintiff global warming litigation, *Kivalina* serves both as an example of the purpose and consequence of the doctrine. As a model of the doctrine's purpose, *Kivalina*'s central issue - who bears the cost of global warming harm - provides an illustration of the types of issues that are inappropriate for judicial resolution. However, as an example of how the political question doctrine can lead a court to dismiss a plaintiff's federal common law claims, *Kivalina* shows how the doctrine's tendency to be used as a hatchet rather than more appropriately as a scalpel.

It remains to be seen whether Washington will be able to provide the avenue for debate the topic of global warming responsibility deserves. Case law is split on the issue, and a comprehensive jurisprudence is needed in order to guide global warming litigation in the future. But with closure comes a dangerous game of Russian roulette for global warming plaintiffs. The choice between the suspiciously active Supreme Court and the now inactive Political Branch is a flip of the coin at best, and the death of environmental adjudication and regulation at worst.

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